

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

2016 JUN 21 AM 9:42

OFFICE OF THE CLERK

RANDALL S. KRAUSE,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY
OF NEBRASKA, a public body corporate;

Defendant.

8:16cv204

SECOND
AMENDED COMPLAINT

INTRODUCTION

1. Plaintiff ("Krause") submits this amended complaint under Fed. R. Civ. P. 15(a)(1)(B) pursuant to the Defendant's Motion to Dismiss under Rules 12(b)(1) and 12(b)(6). This is a citizen suit for declaratory and injunctive relief under section 7002(a)(1)(A) of the Resource Conservation and Recovery Act ("RCRA") against the Board of Regents of the University of Nebraska (the "University").

2. Krause alleges that the mass release of balloons during University football games results in open dumping under RCRA. The University denies this allegation. The parties seek a declaration from the Court that resolves the controversy, each in its own favor. Krause seeks an injunction against the University enjoining the mass release of balloons.

JURISDICTION

3. This Court has subject matter jurisdiction pursuant to RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A). The University does not have immunity in this case under the Eleventh Amendment to the U.S. Constitution. Congress' prohibition against open dumping in RCRA validly abrogates Eleventh Amendment immunity through enforcement of the Fourteenth Amendment, as applied to cases implicating the fundamental right to life.

4. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under RCRA, 42 U.S.C. §§ 6901-6992k, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

VENUE

5. Venue properly vests in this Court pursuant to 28 U.S.C. § 1391 because the alleged violations of RCRA occurred and continue to occur within the state of Nebraska.

PARTIES

6. The Board of Regents of the University of Nebraska has constitutional and statutory power for general supervision over all elements of the University, control and direction of all expenditures, and for general operating policies of the University.

7. Krause resides in Omaha, Nebraska, and seeks to protect children in Nebraska and the United States.

STATUTORY AND REGULATORY FRAMEWORK

8. RCRA § 7002(a)(1)(A) provides that citizens may commence a citizen suit “against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA].” 42 U.S.C. § 6972(a)(1)(A).

9. RCRA § 1002(b) states that “Congress finds with respect to the environment and health” that “disposal of solid waste...in or on the land without careful planning and management can present a danger to human health and the environment;” and that “open dumping is particularly harmful to health...” 42 U.S.C. § 6901(b)

10. RCRA § 1003(a) states that “The objectives of [RCRA] are to promote the protection of health and environment...by...prohibiting future open dumping on the land...” 42 U.S.C. § 6902(a)

11. RCRA § 4005(a) prohibits “any solid waste management practice or disposal of solid waste...which constitutes the open dumping of solid waste...” 42 U.S.C. § 6945(a).

12. RCRA § 1004(3) defines “disposal” as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.” 42 U.S.C. § 6903(3)

13. RCRA § 1004(27) defines “solid waste” as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities...” 42 U.S.C. § 6903(27).

14. 40 CFR § 257.1(a)(2) states that “Practices failing to satisfy any of the criteria in [40 CFR] §§ 257.1 through 257.4...constitute open dumping, which is prohibited under section 4005 of [RCRA].”

15. 40 CFR § 257.3-8(d) states that “A facility or practice shall not allow uncontrolled public access so as to expose the public to potential health and safety hazards at the disposal site.”

16. Section 1 of the Fourteenth Amendment to the U.S. Constitution states that “No state shall...deprive any person of life, liberty, or property, without due process of law...”

NOTICE

17. Dr. Hank M. Bounds, the president of the University of Nebraska, received the original and supplemental notices of Krause’s intent to sue by registered mail, return receipt requested on February 25 and March 7 of 2016, respectively. Doc. #1, Exhibits A and B. Krause also mailed a copy of the notices to the Administrator of the United States

Environmental Protection Agency (“EPA”), the Regional Administrator for EPA Region 7, and the Administrator of the Nebraska Department of Environmental Quality Waste Management Division in accordance with 40 CFR § 254.2(a)(2).

18. Sixty days have passed since Mr. Bounds received the supplemental notice and no one from the University has communicated with Krause about the violations complained of in the notices. The mass balloon releases will likely continue. Neither EPA nor the State of Nebraska is diligently prosecuting a civil or criminal action to redress the violations.

FACTS

The Release

19. For at least the past 50 years, the University has promoted mass balloon releases during football games at Memorial Stadium on the campus of the University of Nebraska-Lincoln, home of the “Huskers.”

20. Hours before every home game, the University fills thousands of 11” diameter latex balloons with helium and ties a poly ribbon to each one (Fig. 1). The ribbons average about 4 feet in length. The balloons bear a University logo and are commonly referred to as “Husker balloons.” The University distributes the balloons to fans entering the game. The intended purpose of the balloons is to enhance the fan experience.



Fig. 1: Poly Ribbon

21. After the Huskers score their first points, it is traditional for the fans to release the balloons into the air (Fig. 2). The balloons serve their intended purpose in the air until the fans can no longer see them. Once the balloons are out of sight of the fans, they can no longer serve their intended purpose.

22. The University does not attempt to retrieve balloons that fly beyond its property.



Fig. 2: Husker balloons take flight.

The Flight

23. After they are released, Husker balloons are carried away by the wind and forces of nature. Virtually all Husker balloons fly beyond University property.

24. As a Husker balloon rises, it expands due to decreasing atmospheric pressure (Fig. 3). Depending on the amount of helium it has, it will either expand and pop, or expand *without* popping.

25. Husker balloons either pop in the air or land intact somewhere.



Fig. 3

26. Virtually all Husker balloons that pop in the air, expand and pop in the upper atmosphere. Husker balloons that land intact expanded *without* popping.

27. Due to the prevailing winds, Husker balloons' displacement has an eastward component. A Husker balloon that does not pop during its flight can land anywhere in the United States east of a meridian that passes through Lincoln, Nebraska. Husker balloons that pop in the upper atmosphere have a lesser range, but they can still travel hundreds of miles horizontally before reaching the altitudes where they pop (Fig. 4).



Fig. 4: Husker balloons can land anywhere in the shaded area.

The Fall

28. Large, medium, small, and tiny pieces fall to earth when helium-filled, Husker-type 11" diameter latex balloons pop in the upper atmosphere.
29. Approximately 82% of the mass that falls to earth when Husker-type balloons pop in the upper atmosphere consists of large pieces that typically have a radial fraying around a central circular mass. These large pieces have, on average, half the mass of a whole balloon (Fig. 5).



Fig. 5: Large pieces after Husker-type balloons pop in upper atmosphere.
(Photo: http://tigerprints.clemson.edu/all_dissertations/959/)

30. Approximately 6% of the mass that falls to earth when Husker-type balloons pop in the upper atmosphere consists of medium-sized pieces of various shapes ranging from 2.5 to 5.0 cm² in total area (Fig. 6).



Fig. 6: Medium-sized pieces after Husker-type balloons pop in upper atmosphere.
(Photo: http://tigerprints.clemson.edu/all_dissertations/959/)

31. Approximately 9% of the mass that falls to earth when Husker-type balloons pop in the upper atmosphere consists of small pieces shredded into thin, 0.50 to 2.50 cm long ribbons (Fig. 7).



Fig. 7: Small pieces after Husker-type balloons pop in upper atmosphere.
(Photo: http://tigerprints.clemson.edu/all_dissertations/959/)

32. Approximately 3% of the mass that falls to earth when Husker-type balloons pop in the upper atmosphere consists of tiny pieces small enough to pass through a 2 mm mesh.

The Trash

33. Husker balloons become "discarded material" and thus "solid waste" under RCRA § 1004(27) by virtue of being abandoned after they have served their intended purpose.

34. Husker balloons become solid waste the moment they are out of sight of the fans.

35. The wind and forces of nature dispose of Husker balloons by placing them on land and water where the balloons become part of the environment. Figure 8 shows balloons in a similar condition.



Fig. 8: Balloon trash.

(Photo: <http://www.fws.gov/news/blog/index.cfm/2015/8/5/Balloons-and-Wildlife-Please-Dont-Release-Your-Balloons>)

36. Releasing Husker balloons results in their transformation into solid waste and disposal by the wind and forces of nature. The portion of the United States east of a meridian that passes through Lincoln, Nebraska, is the disposal site for Husker balloons.

The Problem

37. Husker balloons are made from biodegradable latex rubber, but they retain their elasticity for 8-10 weeks when exposed to air. The poly ribbons tied to Husker balloons are petroleum-based and are not biodegradable.

38. Of all children's products, balloons are the leading cause of suffocation death, according to Consumer Product Safety Commission ("CPSC") injury data.

39. 16 CFR 1500.19(b)(2) requires that latex balloon packages bear the following cautionary statement:



WARNING:

CHOKING HAZARD--Children under 8 yrs. can choke or suffocate on uninflated or broken balloons. Adult supervision required.

**Keep uninflated balloons from children.
Discard broken balloons at once.**

40. Husker balloons do not bear a cautionary statement.

41. Children under 8 years commonly put things in their mouths (Fig. 9).

42. Husker balloons land intact and in pieces where children under 8 years have uncontrolled access to them.

43. Husker balloons that do not pop will eventually deflate. Children under 8 years can choke or suffocate on deflated Husker balloons if they put them in their mouths.

44. Children under 8 years can choke or suffocate on pieces from popped Husker balloons if they put them in their mouths.

45. Children who find an inflated Husker balloon will likely treat it as a toy. According to CPSC, toys with long ribbons are dangerous for young children. The ribbons can become wrapped around a child's neck, causing strangulation.



Fig. 9

46. Because Husker balloons land intact and in pieces where children under 8 years have uncontrolled access to them, the disposal of Husker balloons by the wind and forces of nature exposes the public to potential health and safety hazards at the disposal site in violation of 40 CFR § 257.3-8(d).

CONCLUSION

47. The disposal of Husker balloons by the wind and forces of nature fails to satisfy the criteria in 40 CFR § 257.3-8(d). Therefore, according to 40 CFR § 257.1(a)(2), the disposal of Husker balloons by the wind and forces of nature constitutes open dumping under RCRA.

48. By promoting the mass release of Husker balloons, the University is engaged in activity resulting in the disposal of solid waste that constitutes open dumping under RCRA. Therefore, by promoting the mass release of Husker balloons, the University is engaged in the act of open dumping in violation of RCRA § 4005(a), 42 U.S.C. § 6945(a).

RELIEF REQUESTED

49. Krause asks the Court to declare that the mass release of Husker balloons results in open dumping under RCRA. Krause asks the Court to issue an injunction enjoining the University from promoting the mass release of Husker balloons.

TRIAL METHOD

50. Krause requests a bench trial.

VERIFICATION

51. I declare under penalty of perjury that the foregoing is true and correct.

Date: 6/21/16

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2016, I filed the foregoing Second Amended Complaint with the Clerk of the United States District Court for the District of Nebraska and the same was electronically transmitted by the Clerk to Stephen M. Bruckner at sbruckner@fraserstryker.com, Robert W. Futhey at rfuthey@fraserstryker.com, and John C. Wiltse at jwiltse@nebraska.edu by CM/ECF.

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